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In the

Supreme Court of the United States

OCTOBER TERM, 1963

1937

No. [redacted]

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO,
ANTONIO VELLUCCI
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

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Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on March 25, 1964.

The opinion of the Court of Appeals (Lumbard, Chief Judge, Kaufman and Marshal, Circuit Judges) is thus far unreported and is reprinted in Petitioners' Appendix A. Petition for rehearing was denied on April 21, 1964, and the opinion thereon is reprinted in Petitioners' Appendix B. Opinions in a companion case are reported in 203 F. Supp. 27 (1962) and 202

F. Supp. 597. The full text of the pertinent opinions in the district court are set forth in the Appendix from the Court below, at pages 49a and 59a, nine copies of which are tendered pursuant to Rule 21(4) of this Court.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

STATEMENT OF THE CASE

The judgment of the Court of Appeals, from which Petitioners seek review, affirmed a judgment of conviction with respect to the Petitioners, Edward Romano and Antonio Vellucci, for a violation of Section 5601(a)(8) of Title 26 United States Code; and, with respect to all Petitioners, affirmed a judgment of conviction for a violation of Section 371 of Title 18 United States Code. The pertinent parts of the Section 5601(a)(8), the presumptions applicable thereunder under Section 5601 (b)(4) and Section 371 are set forth in Petitioners' Appendix C.

Upon the trial, all Defendants-Petitioners were convicted on all counts as charged and sentenced on June 29, 1962. (R. 829a-836a) Appeal was taken to the Court of Appeals for the Second Circuit; and that Court, on March 25, 1964, reversed the conviction of Frank Romano and John Ottiano on Counts 1 and 2; affirmed the conviction of Frank Romano and John Ottiano on Count 3 and affirmed the convictions of Edward Romano and Antonio Vellucci on Counts 2 and 3.

Defendant-Petitioners Frank Romano and John Ottiano were charged in a three count indictment, with a violation of § 5601 (a)(1) on the first count, § 5601(a)(8) on the Second Count and with conspiring, § 371, to violate § 5601(a)(8) in

the Third Count, Defendants-Petitioners Edward Romano and Antonio Vellucci were charged with a violation of Section 5601(a)(8) on the Second Count and with conspiring in violation of § 371, Title 18 to violate § 5601(a)(8) in the Third Count, the full pertinent text being set forth in Appendix C.

Thereafter, Petitioners were granted an extension of time within which to file a Petition for Rehearing, to April 14, 1964. Included in the Petition for a Rehearing was an application for a stay of the issuance of the mandate of that Court for thirty days pending a petition for certiorari to be filed in this Court. On April 21, 1964, the Court declined to rehear the case and denied the application to stay the issuance of its mandate. A copy of the opinion on the Petition for Rehearing is reprinted in Petitioners' Appendix B. Associate Justice Harlan extended the time to file this Petition to June 20, 1964.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining that the defendants, Edward Romano and Antonio Vellucci, lacked standing to complain about the search and seizure in this case; and, did the Court of Appeals err further in determining that a trespass by government agents upon property of a co-defendant in order to obtain the information upon which the search warrant was based was not an invasion of any constitutionally protected right of any of the defendants?

2. Did the Court of Appeals err in determining that once federal agents are issued a search warrant by a magistrate, thereafter, federal agents may destroy large portions of the items seized under the warrant without some application to the issuing Court and without any notice to any person who was found present; and, nonetheless, that the burden of showing prejudice by reason of the destruction rests upon the defendants?

3. Did the Court of Appeals err in refusing to determine that once the government elects to record testimony before a grand jury on a case that the government is obliged to record all of the testimony in connection with that case?

4. Did the Court of Appeals err in determining that the entire case report of the group supervisor, Nadel, containing in part the reports of other agents acting under his supervision, need not be produced after Nadel had testified where appropriate demand, under Title 18 United States Code, Section 3500, was made.

5. Did the Court of Appeals err in determining that an unconstitutional charge of a presumption of guilt is not substantial error where the jury could have relied upon that charge to find guilt on any count?

REASONS FOR ALLOWANCE OF THE WRIT
STATEMENT OF FACTS

On October 10, 1960, Agents Mortimer Nadel and Samuel Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with Officer Donald Harris of the Connecticut State Police, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. The purpose of this visit was to attempt to verify certain information concerning an alleged violation of the revenue laws taking place on the premises.

"Aspinook Mill" is a large complex of industrial buildings covering a number of acres of land. Parts of the complex had been and were occupied by tenants. There was an entrance to the property; and, beyond the entrance, two roadways were available for access to all of the buildings. One of these roadways ran along the river that bordered the property on the west. The other ran toward the railroad tracks that bordered

the property on the east. The northerly side of the mill was bordered by the river and by a hydro-electric spillway. The entrance gate was on the southerly side of the property.

The three agents proceeded along the easterly boundary of the property with Officer Harris of the State Police acting as the guide. There was a fence along this part of the property and as the three agents walked along the outside of the fence they came upon an aperture through which they gained entry into the "Aspinook Mill" property. This property was owned by the Griswold Corporation, a duly organized and existing Connecticut corporation; and a defendant in this criminal prosecution. At the conclusion of the Government case Griswold Corporation and Samuel I. Cohen were discharged on motion of their counsel. No permission for this entry was requested and none was granted. (R. 133a)

The intelligence available to the federal agents indicated that there was an illegal distilling apparatus located in the extreme northwesterly corner of the industrial complex previously described. (R. 24a)* After gaining entry through the hole in the fence, the three agents then proceeded, under the cover of darkness, through a series of buildings until they were in the so-called paint shop area. This scouting expedition took place between 10:30 and 11:00 p.m. At this point, from a concealed position in the buildings, the agents could detect the odor of fermenting mash. (R. 130a) The building in which they detected the odor of fermenting mash was located in the extreme northwest corner of the complex and all of its windows had been covered with some substance that prevented light from showing on the outside at night.

Earlier, other agents of the Alcohol Tax group set up an observation position on high ground across the river from the

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* References are to Appendix Pages.

"Mill" site. Apparently all of the windows were not covered because Agent Shaw, using a high powered set of binoculars, made observations of the interior of the building through what was apparently a single unpainted or uncovered pane of glass. From these observations, Agent Shaw made an affidavit that there appeared to be equipment in the building that could be used for distilling purposes. (R. 22a) On the basis of the observations made through the binoculars and the entry on the "Mill" premises on the night of October 10, two agents, Shaw and Sushman, prepared affidavits that were the basis for the issuance of a search warrant for the northwest corner building. The warrant was issued and directed the agents to search and seize specific items forthwith. (R. 26a-27a)

On October 13, 1960 at 7:30 a.m. a group of agents and officers of the Connecticut State Police went to the "Aspinook Mill" and entered the described premises. On the premises they found the defendant, Frank Romano, and the defendant, John Ottiano. They also found a large capacity still. The evidence indicated the still had been in operation for about four days. Ottiano had arrived at the premises in a pick-up truck that had been purchased around September 14, 1960, in Providence, Rhode Island by the defendant, Antonio Vellucci.

About one hour after the agents gained access into the "still premises" the defendants, Frank Romano and John Ottiano, were taken to the State Police Troop at Colchester, Connecticut. Later, on October 13, 1960, Agent Sushman and others took both of these men to New Haven for presentation before Judge Timbers for a preliminary hearing and setting of bond.

When the two defendants, found on the premises, were removed, the inventory had not been completed. They were never given a copy of the inventory. The senior agent, Mortimer Nadel, after some time had been spent taking photographs, gave directions that certain of the items should be destroyed.

At a subsequent hearing the Government presented an itemized list of the items destroyed at the direction of the government agents. At no time, however, was there any request for the permission of the Court to destroy any of the items seized under the authority of the search warrant. (R. 347a)

On December 1, 1960, each of the defendants in this appeal, together with others, were indicted by a grand jury sitting in New Haven. In addition to the defendants herein, the Griswold Corporation and one of its officers, Samuel I. Cohen, were named as co-defendants along with a number of John Does.

After pleas of not guilty had been entered, the defendants filed motions that were the subject of hearings by the district court. One of these motions was for discovery, under Rule 16, Federal Rules of Criminal Procedure, of the items taken by seizure or by process from the defendants, Frank Romano and John Ottiano. The Court granted this motion. After the Rule 16 motion was granted, counsel for the appellants made two attempts to see the items taken by the search warrant. The Government claimed that the Court order was limited to the items taken from the persons of Frank Romano and John Ottiano. As a result of this position, defense counsel requested that the Court issue an order compelling compliance with the order previously entered. At the hearing scheduled on this point, it was disclosed, for the first time, that compliance was not possible because the Government had destroyed a great deal of the items seized. (R. 347a, 376a-377a) Defendants, thereupon, made a motion to dismiss the prosecution on the grounds that the Government had elected to destroy evidence. This motion was scheduled for a subsequent hearing and was denied. (R. 59a)

Defendants also made a motion, under Rule 41 of the Federal Rules of Criminal Procedure, to supress the evidence seized under the warrant issued in October of 1960, upon the grounds

that the warrant was based upon an illegal entry of the premises and upon the ground that the warrant was not properly executed in that the search and inventory was not made in the presence of two of the defendants found on the premises. This motion was denied with leave to raise it at the time of trial. Prior to the trial, other motions were made to the Court by other defendants; and they were afforded a hearing, before trial. When the defendants herein renewed the motions, the rulings on the motions of other defendants was applied to the appellants' motions. The jury trial began on May 1, 1962, and 31 days later the jury returned a verdict of guilty on each count with respect to each defendant-appellant.

During the trial, it developed that the Government agents had found a large distilling apparatus in operation on the premises. The Government offered evidence which showed that there were certain glass jars of a type distributed by a Connecticut representative of the Knox Glass Company found on the premises. The president of the distributor testified that he had sold jugs of this type to two men whom he identified as Frank Romano and Edward Romano. The witness also testified that they were operating a Ford pick-up with a rack body of the same type and year as that found on the still premises on the morning of the raid. Another witness testified that he was directed by his employer to deliver some truck loads of sugar to a location outside of Providence, Rhode Island. The person who met him drove away with the truck and returned about an hour and a half later with the truck empty. The time just to travel from Providence to Jewett City and back was estimated well in excess of this time. The type of sugar was 60 lb. bags of Domino Brand sugar. Neither of the Government witnesses was able to state with certainty that the glass jugs or the empty or full sugar bags found in Jewett City were the same as those sold some time earlier. On the "still premises"

the Government produced photographs of a commode and a shield, apparently of plywood, segregating the lavatory from the rest of the premises. (R. 715a-717a)

Later the Government produced a witness who indicated that at some indeterminate date in September, 1960, he saw the defendant, Ottiano, and the defendant, Edward Romano, in a building on the extreme southerly part of the industrial complex. The witness stated that these two men were looking for a piece of plywood and the commode. The witness stated that he called Providence to obtain permission to let them take it. There was no evidence that Antonio Velluzzi had ever been in Jewett City and specifically there was no evidence that he had ever been on the "Aspinook Mill" premises.

The chief witness for the Government was Agent Mortimer Nadel. He was the group supervisor. This agent, in addition to directing the activities of the investigation before and after October 13, 1960, prepared the report of the investigation. This report was made up, in part, by his own observations and in part by the reports of the other agents. The defendants made a demand, at the end of the direct testimony that the entire report of this witness be made available under Section 3500 of Title 18. This would have included not only the written report of Mr. Nadel, but the written reports of all of the agents working under him. The defendants claimed that he adopted and approved these reports by submitting the report to his superior, the witness, Norton. In addition, the defendants demanded that the Government produce all of the grand jury transcript of the testimony, not only of this witness, but of all other witnesses that it expected to call, to the Court. It appears from the status of the record that the Government elected to take the testimony of certain witnesses before the Grand Jury and to exclude the testimony of others. The entire report of agent Nadel was not produced while he was on the stand

available for cross-examination. In addition, the defendants claim that the Government had an obligation to have the testimony of all of the witnesses transcribed, and that under Rule 6 it could not select those witnesses that it would record stenographically and exclude others. The Government produced only that which it could find and could not explain adequately why others were not transcribed or why it was not taken, or with exactitude if it was taken.

At later stages of the trial, some of the agents who made reports concerning the activity before, during, and after October 13, 1960, were called as witnesses. It is true, at the conclusion of their testimony, their reports were delivered to defense counsel.

AS TO THE FIRST QUESTION PRESENTED

Did Edward Romano And Antonio Vellucci Lack Standing To Complain Of The Unreasonable Search And Seizure; And Whether A Simple Trespass By Government Agents Upon Property Of A Co-Defendant To Obtain The Information Necessary For A Search Warrant Was Not An Invasion Of A Constitutionally Protected Right?

Petitioners' claim that the evidence obtained on October 13, 1960 should have been suppressed because of the illegal search conducted on October 10th was disposed of by the Court below upon the following grounds:

a. Petitioners lacked standing;

b. The search warrant was not directed specifically against these petitioners;

c. Possession was not an element of the crime with which the Petitioners were charged;

d. Even if Petitioners had standing, the action on October 10th was a simple trespass and does not constitute an illegal search.

A. Standing.

The import of *Jones* vs. *United States,* 362 U.S. 257 (1960) was to remove the restrictive and narrow interpretation given the concept of "standing" by the lower Courts. It is submitted that since the five years of the *Jones* case, *supra,* the Courts have not met the direction and import of that decision.

The *Jones* case, *supra,* eliminated the requirement that proof of a possessory interest be a pre-requisite to any defendant moving for the suppression of evidence. Prior to *Jones,* it was necessary to show ownership or the interest of a licensee or invitee, or some other interest involving dominion. *Jones* cut the thread of these decisions totally. If *Jones* is to stand for anything it must be for the proposition that the alleged use of the premises by the defendant confers standing, and permits the defendant to invoke the privacy of the premises searched once the defendant makes a legitimate use of the premises.

There arises the inevitable definition of a legitimate use; and, in the ordinary sense of that phrase, this would exclude an illicit distillery. In *Jones,* however, the defendant was using the apartment of another to secrete narcotics. Despite this, this Court found the defendant "legitimately" on the premises. The principle appears to be clear that where the owner or lessee of the premises gives another permission to use the premises, that permission makes the use "legitimate" and confers upon the user the benefit of privacy in the premises and thereby brings the user within the ambit of the protection of the Fourth Amendment. Petitioners contend that some person or persons having obtained the permission of the co-defendant, Griswold Corporation, for the use of the premises, and absent any show-

ing that such presence was criminal as to Griswold Corporation, Petitioners, Edward Romano and Antonio Vellucci, did have standing.

In addition, the federal courts have set up the proposition that there exists an inter relation between prejudicial effect and standing. In *Hair* vs. *United States*, 289 F.2d 894 (D.C. Cir. 1961) the Court said that where the admission of the evidence would sufficiently prejudice the interest of a co-defendant, in effect it warranted standing to the co-defendant citing *McDonald* vs. *United States*, 335 U.S. 451 (1948). Thus, standing must be equated against the posture of the total prosecution and where, as here, the Petitioners are charged as conspirators with the title owners and with "John Does," standing to suppress must be found to exist.

B. The Search Warrant Was Not Directed Specifically Against The Petitioners.

Generally speaking, search warrants are not directed at persons but at places or premises. In the affidavits of the investigating agents, all of the Petitioners are mentioned. (R. 22a-25a) As *Jones* vs. *United States, supra*, pointed out, when the warrant was directed to a place where the defendant was an occupant, regardless of how temporary, sufficient "standing" exists. It is clear from the evidence that all of the accused were claimed to have been present at some time prior to the execution of the warrant. Frank Romano and John Ottiano were found there on the morning of the raid. (R. 67a) Edward Romano and John Ottiano were claimed to have been present at a time when the illicit still was being assembled. (R. 715a-717a) Antonio Vellucci, while never shown to be actually present is claimed to be constructively present by means of the truck registered in his name. (R. 25a) The Court should have found a sufficient possessory interest through this

item alone to confer standing on Vellucci. Still, contrary to the clear import of the *Jones* case, the Court found that there existed no prejudice since the warrant was not directed at them. Petitioners believe that where the scope of the Constitutional protection extends to an interest, this factor supersedes the specific direction. Directing a search warrant at one person or place does not limit the constitutional guarantees to that person but must leave intact those guarantees with respect to all persons within the ambit of the search. *Wong Sun* vs. *United States*, 371 U.S. 471 (1963).

C. Possession Was Not An Element Of The Crime With Which The Petitioners Are Charged.

The Court below determined that since Edward Romano and Antonio Vellucci were not charged with possession of the illicit distillery, they were not in the predicament that the *Jones* case, *supra*, sought to remedy. This reverses the entire thrust of the decision in *Jones* by limiting its application to cases in which the defendant is charged with illegal possession. The following language from *Jones* vs. *United States, supra*, at 263 points up the error:

> "(2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied for it need not be as extensive a property interest as was required by the Court below."

D. Even If The Petitioners Had Standing, The Action Of October 10 Was A Simple Trespass And Does Not Constitute An Illegal Search.

Assuming "arguendo" that all of the Petitioners have standing, the Court below reasoned that the evidence was not rendered inadmissible merely because it was obtained by the

simple trespass. (R. 65a-66a) Both Courts below cited *Hester* vs. *United States*, 265 U.S. 57 (1924) as authority for the proposition that a mere trespass by the government is not sufficient to render the search and seizure illegal as exploratory. There are apparently two existing hypotheses. The first, *Hester* vs. *United States, supra,* makes the trespass a nullity. The trespass as a necessity is expressed in a number of cases: *Goldman* vs. *United States*, 316 U.S. 129 (1942); *Silverman* vs. *United States*, 365 U.S. 505 (1961); *On Lee* vs. *United States*, 343 U.S. at 751-752 (1952) where the decision turned upon the fact that "no trespass was committed," *Ibid.* Petitioners submit that the *Hester* case, *supra*, has been misconstrued since there existed in that case a clear act of abandonment in an open field. This makes that case clearly distinguishable from the case at bar. If there are two theories, which if they exist Petitioners submit are in conflict with one another, this Court should determine and decide between them.

(1) *The Derivative Trespass*:

The *Jones* case, *supra,* and the *McDonald* case, *supra,* reflect a determination that finite definitions developed by the common law are not the ultimate limitation upon constitutional guarantees. Both of these cases have extended the area of protection of the Fourth Amendment notwithstanding the defendants' lack of a common law property interest thereby creating a theory of derivative standing. In the "nullity theory" cases, the defendant is usually an occupant of the premises owned by another. *Hester* vs. *United States, supra; Gracie* vs. *United States*, 15 F.2d 644 (1st Cir. 1926). The reasoning in these cases must be based upon a *pre-Jones* concept of "standing," since there is no trespass to the defendant's property. Petitioners submit that such a concept places too great a restriction upon the protection afforded by the Fourth Amendment, limiting the protection to persons only in relation to some interest in

property. Petitioners submit that such a limitation denudes the individual while cloaking the property. Clearly, the open field theory weighed heavily in the decision by both the district court and the Court of Appeals. These Courts found the trespass not to constitute an unreasonable search and not to have affected a protected area. Petitioners submit that the *Jones* case and others do not limit the constitutional guarantee to houses or specific common law interests in land. *Cf. Lustig* vs. *United States*, 338 U.S. 74 (1949) covering a hotel room; *Gambino* vs. *United States*, 275 U.S. 310 (1927), *Henry* vs. *United States*, 361 U.S. 98 (1959), an automobile; *Rios* vs. *United States*, 364 U.S. 253 (1960), an occupied taxicab; and *Lanza* vs. *New York*, 370 U.S. 139 (1962), a jailhouse. The facts here show that the "verification — investigative" party passed through a series of interconnected buildings owned by a co-defendant to a point where the officers made the observations necessary to prepare the foundation affidavits. (R. 132a-133a) That it was an investigatory or exploratory intrusion is not in dispute and it is clear that no permission was asked or granted. In other words, federal agents made a physical invasion of the co-defendant's property for the express purpose of making observations of another area of the same co-defendant's property, without any preceding act of abandonment as in *Hester, supra.* It would seem that if one invades one area that is protected and then observes by his senses activity in another area physically connected to the area invaded, he is in no position to claim simple trespass, especially since there existed an alternative route, *i.e.* the river from which point all of these observations could have been made without the physical invasion.

AS TO THE SECOND QUESTION PRESENTED.

ONCE FEDERAL AGENTS ARE ISSUED A SEARCH WARRANT BY A MAGISTRATE, THEREAFTER, MAY FEDERAL AGENTS DESTROY LARGE PORTIONS OF THE ITEMS SEIZED UNDER THE SEARCH WARRANT WITHOUT SOME APPLICATION TO THE ISSUING COURT AND WITHOUT ANY NOTICE TO ANY PERSON WHO WAS FOUND PRESENT; AND, IS THE BURDEN OF SHOWING PREJUDICE BY REASON OF THE DESTRUCTION IMPOSED UPON THE DEFENDANT.

There exists no dispute that there was an opportunity to advise the district court of the circumstances of the seizure in the case at Bar. The record reflects (R. 67a) that one of the agents to whom the search warrant was issued appeared before the Court on the afternoon of the "raid". No mention of the destruction was made until five months later, and then only after the defense moved to compel disclosure pursuant to the order made under Rule 16 in February.

In *United States* vs. *Consolidated Laundries Corp.*, 291 F.2d 563 (2 Cir. 1961), the Government failed to produce certain documents. When the defense raised objection the trial court held that the defendants "failed to prove that they were materially handicapped as a result of the absence of the papers," and that the documents would not have affected the determination of the defendants' guilt.

The Second Circuit stated that it was impossible to know whether the result of the trial would have been different if defense counsel had the documents. *Ibid* at 570. The Court went on to say that a negligent suppression of material evidence by the Government entitles the defendant to a new trial, citing *United States* vs. *Heath*, 260 F.2d 623 (9. Cir. 1958) where the Government lost items claimed by the defense to

have evidential value. While the Court based its reversal in the *Consolidated* case *supra* upon the supervisory power of Appellate Courts over the administration of criminal justice, *Id* at 571, Petitioners submit that any unilateral decision by federal agents acting under and by authority of a search warrant, to destroy material portions of the seizure — and in the instant case large portions, violates so fundamental a principle of fairness as to amount to a denial of due process of law. In the case at Bar, both Courts below discounted the defense contention because the defense was unable to show how they were prejudiced. This means that the burden has been shifted to the defense to show that the outcome of the trial would have been different had the items not been effectively removed by the decision of the agents to destroy. Such a showing is impossible. This impossibility was effectively recognized in the *Consolidated* case, *supra,* when the Second Circuit pointed out that the evidence suppressed—wilfully or negligently — need only be material. Petitioners submit that there was nothing more material in this case than the total instrumentality necessary to commit the criminal violation — the entire still.

Petitioners would also point out that there exists an apparent conflict between the decision in the *Consolidated* case, *supra,* and *Ramsey* vs. *United States,* 245 F.2d 295 (9 Cir. 1957)

The *Ramsey* case holds that wilfull destruction does not constitute a proper basis for error. It seems almost fundamental that there should exist a double standard in federal criminal cases — as appears from the decisions of *Heath* vs. *United States* and *United States* vs. *Consolidated Laundries, supra* on the one hand and *Ramsey* vs. *United States, supra,* and the holding below, on the other.

AS TO THE THIRD QUESTION PRESENTED.

Once The Government Elects To Record Testimony Before A Grand Jury On A Case, The Government Is Obliged To Record All Of The Testimony In Connection With That Case.

It cannot be disputed that there exists a wide difference of approach, even within circuits, about the taking of stenographic notes of grand jury proceedings. Recently, the Supreme Court decided that once trial began the entire transcription of the grand jury testimony taken stenographically should be made and held available.

The issue in the instant case is somewhat different. In this case there was a stenographer present during some of the grand jury proceedings and that portion of the testimony for which notes could be found was transcribed. (R. 298a, 305a, 307a, 352a, 361a, 586a)

It is also clear from the record that there exists a doubt concerning two factors, either of which require dismissal. First, why was not all of the testimony transcribed and second, why was there no clear cut record of the stenographic notes being held under seal in the clerk's office?

This Court has not yet decided whether the proceedings of a Grand Jury are so much a part of the judicial process instituted against an accused that a record of those proceedings is required to be preserved.

> ". . . (A) ny criminal prosecution is inherently unfair to the defendant, semantic presumptions of innocence notwithstanding. The defendant . . . is being accused of a crime against the community, an assault upon the status quo. The plaintiff is the People. The complaint doesn't contain vague allegations drawn by some lawyer trying to

> earn a fee, but is an indictment returned by a grand jury. Plaintiff's counsel is no unknown attorney, but the public prosecutor. 'Accused,' 'crime,' 'grand jury,' 'indictment,' 'district attorney,' 'people' — these are words that evoke an emotional response. All of the majesty of the law, all of the dignity of the prosecutor's office, all of the outrage of the community, is working to the prejudice of the defendant."
>
> Polstein, *"How to 'Settle' a Criminal Case"*, 8 Prac. Law, 35, 43.

Confronted with such a problem the accused needs all of the ammunition he can load into the breach of defense. One "round of ammunition" importantly consists of his right to move to dismiss an indictment.

However, the defendant, before trial, is unable to make such a motion unless he knows the basis for the issuance of the indictment. This basis lies with the Grand Jury.

Let us, by analogy, compare the cases in which the defense requests an inspection of the grand jury minutes at the trial. The Second Circuit takes the approach that an in-camera inspection is mandatory. *United States* vs. *Spangelet*, 258 F.2d 338 (2 Cir. 1958); *United States* vs. *Giampa*, 290 F.2d 83 (2 Cir. 1961). In *United States* vs. *Zborowski*, 271 F.2d 661 (2 Cir. 1959), the Court pointed out that the request for an in-camera inspection should be granted even when there is no showing of an inconsistency in the testimony; the Court, giving as its reason, the fact that "it offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the trial judge."

In *United States* vs. *Hernandez*, 290 F.2d 86, 88 (2 Cir. 1961), the Court said that to require the defense to point out inconsistencies before granting the motion for an in-camera inspection would be a self-defeating condition. "For neither

defendant nor his counsel has the grand jury minutes (indeed the request would not be made if they had them at hand); and, to require a bill of particulars in support of the request when from the nature of the situation counsel cannot know such details is to deny the rule itself." *Ibid.*

The defense is confronted with a similar self-defeating condition to its pre-trial motion to dismiss the indictment. If valid grounds exist, and in the case at bar there is every reason to surmise that they exist, the defendant is helpless because the Court will not grant the motion on surmise. The Government, therefore, can effectively thwart any motion directed at the indictment, other than to its content, by simply "neglecting" to record the Grand Jury proceeding.

> "The regularity of grand jury proceedings in the federal system is presumed and the burden of proving regularity does not shift to the government merely because the defendant makes unsupported claims on a motion attacking the indictment."
>
> *United States* vs. *Greenberg*, 204 F. Supp. 400, 402 (D.C. S.D.N.Y. 1962);
>
> *United States* vs. *Johnson*, 319 U.S. 503 (1943).

How can the defendant support its motion to dismiss the indictment when there is not a record to affirm his reasons for attacking the indictment?

> "It can hardly be doubted that it is conducive to more even justice that the testimony of grand jury witnesses be recorded for the knowledge of the witness that his words may thereafter appear against him is calculated to produce the truth from his lips and it is conceivably of benefit to the accused and the witnesses as well."
>
> *United States* vs. *Weathers*, 21 F. Supp. 763 (D.C.N.D. Ga. 1937).

AS TO THE FOURTH QUESTION PRESENTED.

MUST THE GOVERNMENT PRODUCE THE ENTIRE CASE REPORT OF THE GROUP SUPERVISOR, NADEL, WHEN THIS REPORT CONTAINS REPORTS OF OTHER AGENTS ACTING UNDER HIS SUPERVISION WHEN APPROPRIATE DEMAND UNDER TITLE 18, UNITED STATES CODE, SECTION 3500, WAS MADE?

The Court below determined that there was no showing of adoption or approval of the reports of other agents covering the subject matter of the raid. The Petitioners assert that such a conclusion involves a semantical act of gymnastics to obviate the clear import of sub-section (e) of Section 3500. The record reflects that Nadel prepared, signed, and forwarded the prosecutive report to the United States Attorney, and this is the necessary adoption referred to in *Rosenberg* vs. *United States*, 360 U.S. 367 (1959). (R. 281a, 282a, 322a-323a, 448a-449a, 516a-523a). It is also clear that the report contained the information that Nadel felt was probative from an investigatory view including a number of reports of others covering the subject matter Nadel covered on direct. In that sense, to say the least, it was material and relevant to his direct and should have been delivered up to the Court. It is also clear that such a tender was made only after repeated defense insistence; and, even then, reluctantly.

It is not necessary that Nadel sign the "other statements" in order that they be adopted or approved by him.

Bergman vs. *United States*, 253 F.2d 933 at 935 (6 Cir. 1958);

United States vs. *Tomaiolo*, 280 F.2d 411, 413 (2 Cir. 1960).

Such production is also not limited to the witness's own statement. In order for it to be produced, it can be someone other than the witness who prepared the statement. It merely must be related to the subject matter of the direct and adopted or approved by the witness.

Clancy vs. *United States*, 365 U.S. 312 (1961);
Campbell vs. *United States*, 365 U.S. 85 (1961).

In addition, Petitioners assert that the language of the statute is mandatory, leaving no discretion open to the Court if the prosecution fails to comply with the Statute upon appropriate demand. The Court below insists that the Petitioners were not prejudiced. It is asserted that prejudice follows from non compliance with the statute and a subsequent "protection" ruling by the trial court does not remove the prejudice. It is not for the defense to show any absence of prejudice. It would now appear that there is a conflict between the Third Circuit, *United States* vs. *Prince*, 264 F.2d 850 (3 Cir. 1959) and the Sixth Circuit *Lohman* vs. *United States*, 251 F.2d 951 (6 Cir. 1958) which find that prejudicial error exists when the Government fails to comply; and, the Second Circuit, in the case at Bar, which holds that even if the error was committed, it can be reformed by "making the investigator available to testify for the defense" at some later point in the trial. No such avenue exists in the statute; and, failure to comply, when demand is made, should constitute reversible error in all circuits.

AS TO THE FIFTH QUESTION PRESENTED.

DID THE COURT OF APPEALS ERR IN DETERMINING THAT AN UNCONSTITUTIONAL CHARGE TO THE JURY CONCERNING A PRESUMPTION OF GUILT IS NOT SUBSTANTIAL ERROR WHERE THE JURY COULD HAVE RELIED UPON THAT CHARGE TO FIND GUILT ON ANY COUNT.

The Court of Appeals found that the statutory presumptions of Section 5601(b)(4) Appendix B, *infra*, "fall outside of the constitutional power of Congress." This, under the earliest of Supreme Court decisions, gives rise to the claim that Section 5601(b)(4) is void and its passage a nullity.

Marbury vs. *Madison*, 1 Cranch 137 (1803);
United States vs. *Harris*, 106 U.S. 629 (1882).

This being properly founded upon the logic that any statute enacted by Congress must yield to the paramount and Supreme Law of the Constitution.

United States vs. *Wong Kim Ark*, 169 U.S. 649 (1898).

In the instant case the Court specifically gave the jury a charge under the provisions of Section 5601(b)(4) *infra*. The defense took exception to the charge upon constitutional grounds before the charge was made, and thereafter, specifically requested the trial court to instruct the jury that the presumption could not apply to the defendants, Edward Romano and Antonio Vellucci. The Court declined — leaving it by such refusal, for the jury to determine as a question of fact whether or not the presumption applied. In addition, the defendants specifically requested the Court to charge that the presumption of guilt could not be used by the jury to find guilt on the charge of conspiracy. The trial court refused. It is submitted that the jury could well have misconstrued the

charge and based the conviction upon the presumption on the conspiracy count.

In this posture, we start with the basic premise of an instruction based upon a statute declared to be void by reason of its unconstitutional character.

The Supreme Court has said that where the verdict of guilty did not specify the ground upon which it rested and the jury had been instructed that their verdict might rest upon a statutory provision that is determined to be unconstitutional, the conviction must be set aside.

Stromberg vs. *California*, 283 U.S. 359 (1931);
Williams vs. *North Carolina*, 317 U.S. 287 (1942);
Yates vs. *United States*, 354 U.S. 298 (1957);
Terminiello vs. *Chicago*, 337 U.S. 1 (1949).

Even where there are two separate bases for a verdict of guilty, one of which is invalid under the constitution, the verdict should be set aside.

Musser vs. *Utah*, 333 U.S. 95 (1948) (dissenting opinion).

It seems clear that the Supreme Court has effectively stated that where a constitutionally protected right is invaded in a criminal proceeding, it cannot be defined as harmless error.

State vs. *Fahy*, 84 S. Ct. 229, — U. S. —, (1963).

It would seem proper, therefore, for this Court to set forth with clarity, if there is a grave doubt whether the error had a substantial influence in bringing about a verdict of guilty.

Krulewitch vs. *United States*, 336 U.S. 440 (1949).

It is submitted where the Court charges upon an unconstitutional presumption and leaves it to the jury to determine whether the presumption should apply that a grave doubt must exist.

CONCLUSION.

1. Each of the questions presented herein poses important questions of Federal Criminal Law that should be decided by this Court.

2. The decision below on question 5 concerning the Court's charge is in conflict with the conclusions in *Barrett* vs. *United States*, 322 F.2d 295 (5 Cir. 1963) *cert. granted*, 375 U.S. 962 concerning the speculative effect upon a jury from the use of an unconstitutional charge.

The writ of certiorari should be granted.

W. PAUL FLYNN, Esq.,
Attorney for the Petitioners.

FRANK J. RACCIO, Esq.,
BERNARD P. KOPKIND, Esq.,
CHARLES L. FLYNN, Esq.,
Of Counsel.

Date. June, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 158—September Term, 1963.

(Argued January 6, 1964 Decided March 25, 1964.)

Docket No. 28227

UNITED STATES OF AMERICA,
Appellee,

vs.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO AND ANTONIO VELLUCCI,
Appellants.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN AND MARSHALL, *Circuit Judges.*

Appeal from judgment of conviction of the District Court of Connecticut, T. Emmet Clarie, *J.*, for violation of 26 U.S.C. §§ 5601(a)(1) and 5601(a)(8), and 18 U.S.C. § 371.

Affirmed, except as to the convictions of Frank Romano and John Ottiano on counts 1 and 2 which are reversed.

ARNOLD MARKLE, Assistant U. S. Attorney, New Haven, Connecticut (Robert C. Zampano, United States Attorney for the District of Connecticut, New Haven, Connecticut, on the brief), *for appellee.*

W. PAUL FLYNN, New Haven, Connecticut (Frank J. Raccio, Kopkind and Flynn, New Haven, Connecticut, on the rbief), *for appellants.*

LUMBARD, *Chief Judge:*

Appellants Frank Romano and John Ottiano were found guilty by the jury of violating 26 U.S.C. § 5601(a)(1), possession of a distilling apparatus not registered as required by 26 U.S.C. § 5179(a). With appellants Edward Romano and Antonio Vellucci, they were also found guilty of violating § 5601 (a)(8), producing distilled spirits when not being authorized to do so by the law, and of conspiring to violate §5601(a)(8), 18 U.S.C. § 371. Of all the issues raised by the defendants-appellants as supporting a reversal of their convictions we find merit in only one — the invalidity of the statutory presumptions of 26 U.S.C. §§ 5601(b)(1) and (4) which were invoked as to two appellants on counts 1 and 2. We therefore affirm the judgment of conviction of all the appellants on the conspiracy charge, count 3, and the conviction of Edward Romano and Antonio Vellucci on count 2 for the unlawful production of distilled spirits. We reverse the convictions of Frank Romano and John Ottiano on counts 1 and 2.

The events leading to the issue of a search warrant and its subsequent execution are undisputed. On October 10, 1960, between 10:30 and 11:00 p.m., Agents Nadel and Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with a State Police Officer, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. "Aspinook Mill," owned by the Griswold Corporation, was a large complex of industrial buildings covering 42 acres of land. The agents had information that there was an illegal distilling apparatus located in the extreme northwest corner of the indus-

trial complex. After gaining entrance through a hole in the fence, the agents proceeded through a series of buildings belonging to the Griswold Corporation which were not leased or occupied. They reached a position in an alleyway from where they detected the distinct odor of fermenting mash coming from the building known as building 9A, located in the northwest corner of the complex. They then left via their route of entry. That same evening between 7:00 p.m. and 10:00 p.m. another agent, Shaw, was located on high ground across the river bordering the industrial complex. Using binoculars, he observed the interior of building 9A where he saw a column still and other items used in the distilling of liquor. Agents Shaw and Sushman then applied to Chief Judge Anderson for a warrant to search building 9A on the basis of their affidavits in which they set forth their observations made on the evening of October 10, and the fact that no registration certificate had been issued by the Treasury Department permitting the distilling of spirits on those premises. Chief Judge Anderson issued the warrant to Shaw and Sushman on October 11.

At 7:30 a.m. on October 13, Shaw, with Federal Agents Norton and Nadel and Connecticut State Police Officers Marikle and Hart, after demanding entry and receiving no answer, forced the front door to building 9A. On the other side of the door was a 753-gallon capacity still and 9 mash vats which contained approximately 5756 gallons of mash. Appellants Frank Romano and John Ottiano were standing several feet from the still. In addition, they found a few hundred Knox glass jugs, 40 sixty-pound bags of Domino sugar and a plywood partition together with other equipment listed in the return. In Ottiano's pocket the agents found the keys to the doors of the building and the lock on the front gate to the mill property. Frank Romano told the agents that he did not know how long the still had been in operation and that he had been

there four days. He showed me agents how to turn off the motor.

As to Antonio Vellucci and Edward Romano, there was testimony that these two shopped together for and purchased a 1960 Ford truck in Vellucci's name about a month before the seizure of the still. There was testimony that this Ford truck was used on several occasions to pick up both Knox jugs and sixty-pound bags of Domino sugar, and Edward Romano and Frank Romano were identified as the drivers of the Ford truck on these occasions. On October 2 the watchman for the industrial complex observed the truck at the still site carrying bags of Domino sugar. When Edward Romano saw the watchman observing the truck, he covered the sugar with canvas. The watchman also saw Edward Romano and John Ottiano at the still site carrying the partition and the toilet that were found in building 9A at the time of the raid.

Vellucci was often seen in the company of Edward Romano during the few weeks preceding the raid. When questioned by an agent at his home shortly after the seizure, Vellucci asserted that his health had been such as to prevent his operating the truck, and that he had left the truck with the keys in the ashtray a few days before the truck was used by the Romanos The hospital records which Vellucci claimed would substantiate his disability did not in fact do so. The evidence is sufficient to sustain convictions on all counts.

The appellants' first claim of error is that the execution of the search warrant violated the Fourth Amendment. They assert that the information supporting the issuance of the search warrant was obtained as a result of a trespass and that this trespass invalidates the warrant and the evidence gained as a result of its use. We disagree. The appellants have no standing to complain of any trespass. They were not the owners or pos-

sessors of the area of land over which the agents traversed in order to gain a position from which they could smell the aroma of fermenting mash coming from building 9A. In any event, it is well settled that evidence is not rendered inadmissible merely because it has been obtained in the course of a simple trespass on land. The protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," does not extend to open fields, or to unoccupied buildings. *Hester* vs. *United States,* 265 U.S. 57. Moreover, the affidavit of Agent Shaw, who, from without the building and land area in question, observed the operation of the still with the aid of binoculars, and the statement in Shaw's affidavit that no still was licensed for these premises constituted sufficient probable cause to justify the issuance of the search warrant by Chief Judge Anderson.

After the execution of the warrant the agents dismantled the still and destroyed some of the property that was there found. The appellants argue that as the government destroyed some of the evidence seized they could not determine whether some of the items destroyed could have served some useful purpose in the defense of the charges. The appellants have failed to show that they suffered any prejudice by reason of the destruction. The essential elements of the still were not destroyed and were available for inspection. Photographs and movies were made prior to dismantling and these were also available to the defendants. The magnitude of this distilling operation made it impracticable to remove the apparatus intact. The destruction of illegal stills and their appurtenances is authorized by 26 U.S.C.A. § 5609 in those cases where "it is impracticable to remove the still and distilling material to a place of safe storage from the place where seized." The distinct hazard of fire as well as the caretaking difficulties involved

are further reasons which justify the destruction of such a still under the statute, and in this particular case.

The claim that the defense, during trial, was improperly denied access to the entire written report of Agent Nadel is without any basis. Nadel's statements were made available when he testified. The only parts of his report not made available then were reports from other agents which he had incorporated in his report. Such reports of other witnesses were made available when those witnesses were called to testify. The defense was given everything to which it was entitled, at the proper time; if the reports of other agents, which Nadel had neither approved nor disapproved, would have been helpful in questioning Nadel, the defense might have asked that he be recalled. This they failed to do.

We come to the one meritorious claim by the appellants. This related to Judge Clarie's instruction to the jury as to counts 1 and 2, informing them of the presumptions in 26 U.S.C. §§ 5601(b)(1) and (4). With regard to count 1, charging unlawful possession of a distilling apparatus, Judge Clarie read § 5601(b)(1) as follows:

> "(b) Presumptions —
>
> "(1) Unregistered stills. — Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence of the satisfaction of the jury."

Judge Clarie also advised the jury with regard to count 2, which charged the defendants with producing distilled spirits

without being authorized by law to do so, that the similar presumption set out in § 5601(b)(4) may be applied,[1] where a defendant is shown to have been at the still site. These presumptions of course could apply only to the defendants Frank Romano and John Ottiano who were found present at the still site where spirits were being illegally produced. Although these presumptions do not require the jury to conclude from the unexplained presence of the defendant at the still site that the defendant is in possession and control of the still, the result is, nonetheless, that with no other evidence against the defendant the jury may find the defendant guilty as charged.

We are of the view that to apply these presumptions to persons shown to have been at the still would violate the due process clause of the Fifth Amendment. *Barrett* vs. *United States*, 322 F.2d 292 (5 Cir. 1963), certiorari granted 375 U.S. 962 (1964). Proof of the fact on which the statutory presumption is based, namely presence, must carry a reasonable inference of the ultimate fact presumed, namely that the person is in possession of the still or is distilling spirits. The inference here is too strained and is not reasonably related to the fact proved. For example, one found present at a still may as well be a purchaser of the distilled product or a visitor for some other business purpose.

The presumptions here involved are totally unlike the one created when unexplained possession of narcotic drugs is

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[1] Title 26, § 5601(b)(4) provides in part:

"(4) Whenever on trial for violation of subsection (a)(8), that is, producing, distilled spirits, the defendant is shown to have been at the site or place and at the time when such distilled spirits were produced by distillation or any other process from mash, wort, wash or other materials, such presence of the defendant shall be deemed sufficient evidence to authorize conviction unless the defendant explains such presence to the satisfaction of the jury."

shown.[2] For the "legitimate possession of opium is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which tend to rebut, the natural inference of unlawful operation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress." *Yee Hem* vs. *United States,* 268 U.S. 178 (1925).[3] We find that the presumptions set out in §§ 5601(b)(1) and (4) fall outside the constitutional power of Congress. There is no broad ground of experience which supports the conclusion that people present at a still site are in possession or control of the distilling opera-

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[2] 21 U.S.C. § 173 provides in part:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, . . ."

21 U.S.C. § 174 penalizes:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . ." and then provides:

"Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[3] But where there is proof that a particular kind of narcotic drug is domestically produced in quantity, the presumption of knowledge of illegal importation has been found without rational foundation, and hence unconstitutional. *Erwing* vs. *United States,* 323 F.2d 674 (9 Cir. 1963), see also *United States* vs. *Gibson,* 310 F.2d 79 (2 Cir. 1962).

tion on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

While the evidence against Frank Romano and John Ottiano, apart from the presumptions, was ample, we cannot speculate as to what weight the jury might have given to the presumptions in reaching its finding of guilt on these two counts. Therefore the convictions of these two defendants under counts 1 and 2 must be reversed. As Judge Clarie made it clear that the presumptions were limited to those present and to counts 1 and 2 only, and as proof of the conspiracy was more than sufficient to sustain the verdict on count 3, we affirm the convictions on count 3 and we affirm the convictions of Edward Romano and John Vellucci under count 2.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 158—September Term, 1963.

(Motions filed April 14, 1964 Decided April 21, 1964.)

Docket No. 28227

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO AND ANTONIO VELLUCCI,
Defendants-Appellants.

Appellee's Motion for Rehearing
Appellants' Motion for Rehearing and Stay of Mandate
in the Event Rehearing Is Denied

Before:

LUMBARD, *Chief Judge,*
KAUFMAN AND MARSHALL, *Circuit Judges.*

ROBERT C. ZAMPANO, United States Attorney, District of Connecticut and Anthony G. Apicella, Assistant United States Attorney, District of Connecticut, on the brief *for appellee.*

W. PAUL FLYNN, New Haven, Connecticut, on the brief *for appellants.*

PER CURIAM:

The petition of the appellants and the petition of the appellee are both denied.

The appellants' claim that they were prejudiced by the alleged failure of the government to have a stenographer make notes of all the testimony before the grand jury is disposed of not only by *United States* vs. *Costello*, 255 F.2d 389 (8 Cir.), *cert. denied*, 385 U.S. 830 (1958), which holds that the district court need not inquire into the sufficiency of evidence before the grand jury, but also by the fact that the appellants' counsel has been unable to demonstrate in his original brief and at the argument before this court that there could have been any possible prejudice to the appellants by reason of incomplete transcription of grand jury testimony.

There was no showing and there is no reason to believe that appellants were at any time denied full disclosure of any grand jury testimony which was transcribed and which contained any statements inconsistent with the trial testimony of any witness. Such grand jury testimony as was available and reflected any possible inconsistencies was in fact turned over to defense counsel.

The other points which the appellants wish us to reconsider are entirely without merit.

The appellants' motion for a stay of the mandate pending application to the Supreme Court for a writ of certiorari is denied

APPENDIX C

26 United States Code, Section 5601 — Criminal Penalties

(a) Offenses — Any person who —

(1) Unregistered stills — has in his possession, or custody, or under his control, any still or distilling apparatus set up, which is not registered, as required by Section 5179(a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

26 United States Code, Section 5601 — Criminal Penalties

(a) Offenses — Any person who —

(8) Unlawful Production of Distilled Spirits — not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash or other material . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

26 United States Code, Section 5601 — Criminal Penalties

(b) Presumptions —

(4) Unlawful production of distilled spirits — Whenever on trial for violation of sub-section (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the Defendant explains such presence to the satisfaction of the jury.

18 United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, . . . or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

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738-008—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 193

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (IV R. 920–928;[1] Pet. App. 29–37) is reported at 330 F. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1964 (IV R. 929). Petitions for rehearing were denied on April 21, 1964 (IV R. 942–943, 944; Pet. App. 39–40). On May 15, 1964, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 20, 1964, and

[1] "R." designates the four-volume record on file with the Clerk of this Court. Also lodged with the Clerk is the original trial transcript and the hearings on the motions to suppress.

the petition was filed on June 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ruling that presumptions applicable to certain petitioners on certain counts were invalid required reversal as to all petitioners on all counts.

2. Whether the search warrant was rendered invalid because it rested in part upon information obtained as a consequence of a trespass over property neither owned by, nor in the possession of, petitioners and on which petitioners were not present at the time of the trespass.

3. Whether government agents improperly destroyed some of the paraphernalia of an illegal distillery found at the still site.

4. Whether petitioners were denied access to statements producible under 18 U.S.C. 3500.

5. Whether the failure of the government to transcribe the testimony of all the witnesses who testified before the grand jury is a ground for reversal of the convictions.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted under an indictment (I R. 30–32) charging substantive violations of the provisions of the Internal Revenue Code relating to distilled spirits, and conspiracy to violate one of these provisions. Count One charged petitioners Frank Romano and John Ottiano with possession, custody and control of an unregistered

still and distilling apparatus (26 U.S.C. 5601(a)(1)); Count Two charged each of the petitioners with illegal production of distilled spirits (26 U.S.C. 5601 (a)(8)); and Count Three charged that all conspired together to produce distilled spirits illegally (18 U.S.C. 371; 26 U.S.C. 5601(a)(8)).[2] They were sentenced as follows: Frank Romano was fined $10,000 on Count One and sentenced to imprisonment for three years on each of Counts One, Two and Three, to run concurrently; John Ottiano was fined $5,000 on Count One and sentenced to concurrent two year terms of imprisonment on each of Counts One, Two and Three; Antonio Vellucci was fined $1,000 on Count Two and sentenced to imprisonment for two years on Counts Two and Three, to run concurrently; Edward Romano was fined $10,000 on Count Two and sentenced to concurrent three year terms of imprisonment on Counts Two and Three (II R. 829–836).

The court of appeals reversed the convictions of Frank Romano and John Ottiano on Counts One and Two, on the ground that the presumptions embodied in 26 U.S.C. 5601(b) (1) and (4), which were incorporated in the trial court's instructions, were unconstitutional (Pet. App. 34–37). It affirmed the convictions of Edward Romano and Antonio Vellucci on Count Two, and the convictions of all of the petitioners

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[2] Samuel L. Cohen, Israel Yarchin and the Griswold Corporation were also named as co-defendants in Counts Two and Three of the indictment. Judgments of acquittal were entered as to Cohen and the Griswold Corporation, and the charges contained in the indictment against Yarchin were dismissed after he entered a plea of guilty to violating 26 U.S.C. 5686 (possession of any liquor or property in violation of any of the provisions of the Internal Revenue Code).

on the conspiracy charge (Count Three), holding that the trial court had made it clear in its instructions that the statutory presumptions were limited in application to the two substantive counts and then only to those persons present at the still at the time it was discovered (Pet. App. 37).

1. Hearings on motions to suppress evidence were held prior to trial. The evidence adduced showed that on October 5, 1960, agents of the Internal Revenue Service were informed by Connecticut State police that the police had received information from a reliable informant that an illegal still was being operated on property, owned by the Griswold Corporation, known as Aspinook Mill in Jewett City, Connecticut. One of the federal agents contacted the informant who told him that he had detected the odor of mash at the premises in question (I R. 24). On the evening of October 10, 1960, two federal agents and a State policeman went to the property, a 42-acre tract composed of a large complex of industrial buildings. After gaining entry to the land through an opening in the fence which surrounded the premises on three sides, the officers made their way to, and entered, a vacant unlocked building which led to an open courtyard. There the officers detected the distinctive odor of fermenting mash coming from an adjacent structure, known as Building 9a. The officers then departed via their route of entry. Earlier that evening, another agent, using binoculars, who was posted on high ground overlooking the complex, had scanned the interior of Building 9a and observed a column still and other items used in the illicit distillation of alco-

hol. That same evening, an automobile fitting the description of a car belonging to John Ottiano, who had a reputation of being a violator of the liquor laws, was seen to drive up to the premises. I R. 21–25, 52–53, 63–64. No still was licensed for the premises.

Based upon the foregoing information, attested to in affidavits filed by two federal agents (John J. Shaw and Samuel Sushman), a search warrant for the premises was issued by the United States District Court for the District of Connecticut (I R. 21–27). Upon executing the warrant, on October 13, 1960, the officers found a 753 gallon capacity still in full operation and 9 mash vats containing approximately 5,756 gallons of mash. Additional paraphernalia used in the distillation process (*e.g.*, hundreds of "Knox" glass jugs and numerous bags of "Domino" sugar) were also discovered on the premises (see I R. 206–210, 226–229, 250). Petitioners Frank Romano and John Ottiano were found inside the building standing a few feet from the still (I R. 336–337). In Ottiano's pocket, the agents found the keys to the doors of the building. Both men informed the agents that they did not know how long the still had been in operation, Frank Romano adding that he had been at the premises for three days. He showed the agents how to turn off the still motor (I R. 213–214, 221, 239).

2. The evidence adduced at trial revealed that Antonio Vellucci's truck was outside the premises at the time the still was discovered by the officers, having been driven there by Ottiano; that this truck had been used on several prior occasions by both the Romanos to pick up "Knox jugs" and bags of "Domino"

sugar; that the truck had been seen at the still site carrying sugar; and that Edward Romano and John Ottiano had been seen at the still carrying a partition and a toilet found in the building at the time of the raid (see II R. 564–568; 619–620; 622–625; 715–721; 730–735).

ARGUMENT

1. On June 10, 1964, the government filed a petition for a writ of certiorari in the instant case (No. 172, O.T., 1964), requesting this Court to review that portion of the judgment of the court of appeals holding the presumptions contained in 26 U.S.C. 5601(b) (1) and (4) unconstitutional and for that reason reversing the convictions of Frank Romano and John Ottiano on Counts One and Two. As we pointed out in our petition, while one of the presumptions involved in this case—that created by subsection (b)(1)—is the same as that involved in *United States* v. *Barrett*, presently pending on a writ of certiorari to the Court of Appeals for the Fifth Circuit, 375 U.S. 962 (No. 13, O.T., 1964), the presumption created by subsection (b)(4)—not involved in *Barrett*—is independently sustainable regardless of the decision as to (b)(1).

If our petition is granted we do not oppose the grant of certiorari as to the question (which we list as number 1 and petitioners as number 5) whether reference to the presumptions in the instructions tainted the conspiracy convictions as well as the convictions of Edward Romano and Antonio Vellucci on Count Two. While we agree with the court below that the instructions, although not specific on this point, were so tailored as to sufficiently indicate to the jury

that it was not to consider the presumptions on the conspiracy count, nor on the substantive counts as to those petitioners not present at the time the still was raided, nevertheless, we recognize that the ruling of the court below suggests a conflict with the determination of the Fifth Circuit in *Barrett* v. *United States,* 322 F. 2d 292, 300, that, once the presumptions are included in the charge, they infect other unrelated counts, unless the trial judge specifically instructs as to their limitation.

We see no reason, however, for review of the other claims raised by the petition, which were fully canvassed and properly rejected by the court of appeals.

2. Petitioners argue that, since some of the information supporting the issuance of the search warrant was obtained as a consequence of a trespass, the warrant was invalid. As the court of appeals held, none of the petitioners have standing to complain of the trespass on the land and vacant building of the Griswold Corporation (Pet. App. 32–33). They did not own or possess any interest in the place where the trespass occurred and were not even present where the trespass took place. The trespass was on adjacent property from where the officers detected the odor of fermenting mash. *Jones* v. *United States,* 362 U.S. 257, which recognized the interest of a guest lawfully in the premises searched is thus inapplicable. In this case no right of privacy petitioners might have had in Building 9–A was invaded by agents travelling over an area where petitioners were not located and which was owned and possessed by the Griswold Corpora-

tion. See *Wong Sun* v. *United States*, 371 U.S. 471, 492.

Even if petitioners have standing to complain of the search and seizure,[3] there is no merit to their complaint because evidence obtained as a result of a simple trespass on land or in an unoccupied building is not thereby rendered inadmissible. *Hester* v. *United States*, 265 U.S. 57, 59; *United States* v. *Sorce*, 325 F. 2d 84, 86 (C.A. 7), certiorari denied, 376 U.S. 931. In any event, the visual information, obtained without any trespass by a government agent through the use of binoculars (see *supra* p. 4), was sufficient probable cause in and of itself to justify issuance of the warrant. See *United States* v. *Lee*, 274 U.S. 559, 563.

3. There is no merit to petitioners' contention (Pet. 16–17) that the government improperly destroyed some of the seized property. The government retained samples of the items destroyed, which were available for inspection by the defense, and the basic components of the still itself were not destroyed ~~stroyed~~ (I R. 193–196). Furthermore, photographs and movies of the site taken prior to dismantling and destruction were also available for inspection by the defense (I R. 298–306). In short, petitioners were in no way prejudiced by the destruction of the distilling paraphernalia found at the still site. Immediate destruction of illegal distilling apparatus is fully authorized by statute where it is impracticable to retain the equipment, 26 U.S.C. 5609. See *Ramsey* v. *United*

[3] The district court found that, while Edward Romano and Antonio Vellucci did not have standing, Frank Romano and John Ottiano did have standing under *Jones* v. *United States*, 362 U.S. 257, 262–263.

States, 245 F. 2d 295, 296–297 (C.A. 9). The magnitude of the distilling operation in this case made any other course impracticable (see I R. 206–210).

4. Petitioners allege a violation of the "Jencks Act," 18 U.S.C. 3500, in the refusal of the trial court to order the production, after the direct testimony of supervising agent Nadel, of statements made by other Internal Revenue agents which Nadel placed in the prosecutive file but did not utilize in making up his own statement (which was turned over to the defense) (I R. 322–324). The statements of other agents were not a proper basis for impeachment of Nadel.

5. There is no basis for petitioners' contention that prejudicial error resulted from the government's failure to provide that the testimony of all trial witnesses who testified before the grand jury be transcribed.[4] It is true that the Second Circuit has held that "[i]f the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial." *United States* v. *Giampa,* 290 F. 2d 83, 85 (C.A. 2). But this rule presupposes that a transcript of the grand jury testimony has been made and is in existence. Thus, in interpreting the rule it had enunciated in *Giampa,* the Second Circuit subsequently pointed out, "we there fashioned a duty for the United States Attorney only in those cases—as in Giampa itself—in which the grand jury proceedings

[4] There is no dispute that the government delivered all of the grand jury transcript that it had to the trial judge for an *in camera* inspection and that portions of such transcript were ultimately turned over to the defense (see *e.g.*, I R. 305–307; I R. 586).

have been transcribed and minutes actually exist. While the presence of a stenographer in the grand jury room to transcribe the witnesses' testimony would be the better procedure, there is no constitutional requirement that grand jury proceedings be transcribed, and we have been able to uncover no provision of rule or statute which makes transcription mandatory rather than permissive." *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (C.A. 2); see, also, *United States* v. *Labate*, 270 F. 2d 122, 123–124 (C.A. 3), certiorari denied *sub nom. Sussman* v. *United States*, 361 U.S. 900.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied except that, if the government's petition in Number 172 is granted, we do not oppose certiorari on question number 1 (petitioners' number 5).

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In the

Supreme Court of the United States

OCTOBER TERM — 1964

No. 123

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO,
ANTONIO VELLUCCI,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

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In the

Supreme Court of the United States

OCTOBER TERM — 1964

No. 193

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

On March 15, 1965, this Court denied the Petitioners' Petition for a writ of certiorari, and, on the same date granted the Petition of the United States. As a result of this action, each of the Petitioners has been surrendered to begin the service of sentence upon Count III (*Cf.* R. Vol. II, 829a, 831a, 833a, 835a*.

* References are to pages of record filed with original petition.

The Petitioners, individually, assert that the Court's determination not to consider the application for a writ of certiorari on Count III has created certain ancillary problems that were not heretofore presented.

In a collateral petition, No. 172, October Term, 1964, filed by the government, the following issue is raised:

> "Whether the presumptions established by Sections 5601 (b) (1) and (4) of the Internal Revenue Code, as here applied, satisfy the requirement of the due process clause of the Fifth Amendment."

This issue encompasses Counts I and II of the Indictment in the instant matter.* (*Cf.* R. 30a) Count III is a charge of conspiring to violate Count II. At the same time, the issues in Counts I and II of the Indictment were specifically excluded by the Court in its decision in *United States* vs. *Gainey*, #13, October Term, 1964, 33 L.W. 4200 *et seq.*

The government did not oppose the request for a writ of certiorari by these Petitioners. We recognize that this alone does not give an adequate basis for granting certiorari on the issues raised in Petitioner's Fifth Question presented. It did, we contend, recognize certain practical difficulties currently existing by reason of the denial of certiorari.

The judgment of commitment (R. 835a) shows that Petitioner Vellucci must stand committed until the fine imposed upon Count II is paid. As previously noted, Vellucci has been incarcerated upon the basis of a final determination under Count III. Pursuant to 18 U.S.C. § 4202, Vellucci would be eligible to seek parole after serving 120 days. In fact, to the date that this Petition for Rehearing is filed Vellucci will have

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* Reference is to Volumes in record submitted with original Petition.

already served 68 days of the time. Thus, while he would be eligible to apply for parole in 52 more days, he is faced with a committed fine on Count II. It may be that his parole eligibility will be materially affected by this fact.

The judgment of commitment of Edward Romano (R. 833a) shows that Romano must stand committed until the fine imposed upon Count II is paid. This Petitioner has actually served 115 days and would be eligible for parole after 250 additional days. The record in this case shows that the appellants' brief is due not later than August 25, 1965. Thus, appellee's brief must be filed by September 24, 1965. Since it is doubtful that this case will be the first considered for oral argument, it may be that oral argument may not be heard by December, 1965. Petitioner, Edward Romano, may be determined to be ineligible for parole — by reason of the fact that there has been no final determination of the issues presented to this Court — under 18 U.S.C. § 4202.

The Petitioners, John Ottiano and Frank Romano, are faced with the same general dilemma. (R. 829a, 831a) Ottiano and Romano have already served 115 days of their sentence. In 129 days, Ottiano would be eligible for parole. That is 4 days after the final date for filing Appellants' Brief. Frank Romano would be eligible for parole in December. In both situations, they may be determined to be ineligible for parole.

In addition, each of these Petitioners is permitted, pursuant to *Rule 35, Federal Rules of Criminal Procedure*, to request the District Court to correct or reduce the sentence imposed under Count III. The entire record of the case, however, is not before the District Court — nor will it be before the Court until there is a final determination of the issues covering Counts I and II. At the same time, the lack of finality of a decision may influence the Court not to consider the *Rule* 35 Motion favor-

ably. While it is improper to hypothecate upon the Court's determination, its capacity to modify on Count III may well expire within 60 days of the ruling on this application.

Petitioners have consistently contended that this case was confusing. The decision in the Court below (Appendix A, p. 37 of Petition) shows the case of confusion when the Court mixed the name of Vellucci with Ottiano to make John Vellucci an accused. Even the Solicitor General confused the Vellucci sentence in its memorandum in opposition to Petition for Bail. All of the issues raised in the dissenting opinions in *United States* vs. *Gainey*, #13, October Term, 1964, March 1, 1965, 33 L.W. 4200 (U.S.) militate toward just the issues that should properly be argued under Point 5 of Petitioners' presented questions. Conspiracy is the vegetable stew of criminal process. We contend that the presumption statute — once read to the jury — changes the fundamental law on every issue before that jury, whether it is explained away or given an adequate applicability explanation or not. Any charge that says to a jury — in effect — the defendant must explain why he was at a given place or you can find that lack of explanation evidence of his guilt requires a violation of the Sixth and Fifth Amendments.

Petitioners,

By W. PAUL FLYNN,
Their Attorney.

April 21, 1965

CERTIFICATE OF COUNSEL

I certify, pursuant to Rule 58 of this Court, that the above Petition is drawn in good faith, that good ground exists to support it and that the same is not interposed for delay.

CERTIFICATE OF SERVICE

This is to certify that (3) copies of the foregoing Petition were mailed, postage prepaid, to the Solicitor General of the United States and the United States Attorney for the District of Connecticut, on April 22, 1965.